

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**ERIK ERNST REPPERT,
Plaintiff,**

vs.

**COCA-COLA FOUNTAIN, ET AL.,
Defendants.**

CIVIL ACTION

NO. 05-3034

MEMORANDUM AND ORDER

Tucker, J.

August __, 2006

Presently before the Court is Defendants' Motion for Partial Summary Judgment (Doc. 35) to dismiss Counts I-IV of Plaintiff's Amended Complaint. For the reasons set forth below, upon consideration of Defendants' Motion and Plaintiff's Response in Opposition (Doc. 36), the Court will grant Defendants' Motion for Partial Summary Judgment.

BACKGROUND

Plaintiff Erik Ernst Reppert ("Reppert") brings this claim of employment discrimination and conversion by Coca-Cola Fountain and Coca-Cola Fountain Sales Corporation ("Coca-Cola"), Supervising Team Leader Tony Apreala ("Apreala"), and Human Resources Manager Diana Ball ("Ball") (collectively "Defendants").

Reppert was diagnosed with epilepsy in 1991. During Reppert's pre-employment physical for Coca-Cola, he provided Defendants with information regarding his disability and its resultant limitations.¹ Despite his disability, Reppert was able to perform the essential duties

¹ Reppert's epileptic condition causes him to experience some difficulty learning and requires that he exercise extra care when performing manual tasks.

required for the position of Production Technician without reasonable accommodations and was hired by Defendant Coca-Cola on or about April 3, 2000.²

On June 25, 2003, two female employees working the night shift at the Lehigh Plant complained that male co-workers had made inappropriate sexual sounds and comments to them over the Lehigh Plant two-way radio system. During the following night shift on June 26, 2003, Apreala and Ball conducted an investigation regarding the incident by interviewing employees who overheard any inappropriate sounds or comments. Several of the employees interviewed reported that Reppert and William Snyder, another Production Technician, were responsible for the inappropriate sounds and comments.

As Reppert left the Lehigh Plant the morning of June 27, 2003, he spotted a plainly visible security camera, to which he exposed his naked buttocks.³ Unaware of Reppert having exposed himself to the security camera, Apreala and Ball reported their initial findings regarding the June 25, 2003 incident to Supervisor Morrow (“Morrow”) on June 28, 2003. (Morrow Aff. ¶ 13.) On or about June 29, 2003, Morrow directed Ball to suspend Reppert for three (3) days with pay pending an investigation of the alleged misuse of the Lehigh Plant radio.

Ball informed Reppert of his 3-day paid suspension pending a further investigation of the alleged incident. At which time Reppert grew upset and began yelling and cursing at Ball. Reppert then walked from Ball’s office, passed the production floor and raised his middle finger to a co-worker. Ball reported Reppert’s conduct to Morrow. Shortly after his suspension, a co-

² Plaintiff’s employment responsibilities regarded all production duties at the Lehigh Plant, including the operation of a forklift and other miscellaneous equipment.

³ Because the camera was not being monitored, however, Reppert’s inappropriate conduct was not discovered until several days later.

worker reported to Coca-Cola that Reppert had exposed himself to a security camera as he left the Lehigh Plant on the morning of June 27, 2003. After reviewing the video footage, Morrow directed Ball to terminate Reppert's employment. On June 30, 2003, Ball sent Reppert a letter informing him that his employment was terminated because he "used loud profanity and gestured with [his] middle finger" and because he "exposed [him]self in public as [he was] leaving the building." (Doc. 26, Defs.' Ex. 19.)

Reppert asserts that the alleged reasons for his suspension and dismissal on July 3, 2003 by Defendants were not work-related, but rather due to a non-job related disability and its resultant limitations after Reppert missed work as a result of a seizure.⁴ In his Complaint, Reppert alleges that on the basis of his epilepsy, Defendants harassed, discriminated and retaliated against him in violation of Section 107(a) of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12117, which incorporates by reference Section 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5 (Counts I & II) and Section 5(a) of the Pennsylvania Human Relations Act ("PHRA"), 43 PA. STAT. §§ 951-963 (Counts III & IV). In Count V of his Complaint, Reppert alleges that Defendants converted Reppert's personal property by taking and failing to return his personal belongings from his work locker.⁵ Reppert seeks declaratory judgment, compensatory damages, reimbursement, back pay, and employment emoluments, including, but not limited to, back pay, benefits, training, promotions, and seniority. Reppert also seeks interest on any withheld amounts plus front pay for his anticipated work life

⁴ Reppert avers that he provided Defendants Apreala and Ball with information regarding his non-job related disability and its resultant limitations after missing work as a result of a seizure.

⁵ A full list of Reppert's alleged converted belongings is attached to Reppert's Complaint as Exhibit 3.

minus credit for any earnings from July 3, 2003.

STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” **FED. R. CIV. P. 56(c)**. An issue is “genuine” if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is “material” if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). **Where the non-moving party bears the burden of proof on a particular issue at trial, the movant’s initial *Celotex* burden can be met simply by “pointing out to the district court that there is an absence of evidence to support the non-moving party’s case.”** *Celotex*, 477 U.S. at 325. After the moving party has met its initial burden, “the adverse party’s response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial.” *Id.* That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit

the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent." *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). The court must view the evidence presented in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255.

With respect to summary judgment in discrimination cases, the court's role is "to determine whether, upon reviewing all the facts and inferences to be drawn therefrom in the light most favorable to the plaintiff, there exists sufficient evidence to create a genuine issue of material fact as to whether the employer intentionally discriminated against the plaintiff." *Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3d Cir. 1987).

DISCUSSION

District Courts must analyze discrimination and retaliation claims involving circumstantial evidence under the *McDonnell-Douglas* burden shifting analysis.⁶ The plaintiff must first establish *prima facie* case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972). If the plaintiff successfully makes a *prima facie* case, the burden shifts to the defendant to articulate a "legitimate, non-discriminatory reason" for the adverse employment action. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). If the defendant meets this burden, the plaintiff must show that the defendant's articulated non-discriminatory reason was, in fact, a pretext for discrimination by pointing to some evidence from which a jury could either disbelieve the employer's articulated legitimate reasons or conclude that a discriminatory reason

⁶ In order to establish a *prima facie* case for discriminatory employment termination under the *McDonnell-Douglas* burden shifting framework, "the plaintiff must prove by a preponderance of the evidence that (1) he belongs to a protected class; (2) he was qualified for the position; (3) he was dismissed despite being qualified; and (4) he was ultimately replaced by a person sufficiently outside the protected class to create an inference of discrimination." *Lawrence v. Nat'l Westminster Bank*, 98 F.3d 61, 68 (3d Cir. 1996).

was more likely than not a motivating or determinative cause of the employer's action. *Walton v. Mental Health Ass'n of S.E. Pa.*, 168 F.3d 661, 668 (3d Cir. 1999). The plaintiff can meet this burden by "demonstrat[ing] such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence.'" *Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (citations and emphasis omitted).

I. Prima Facie Discrimination Under the ADA

In order to establish a prima facie case of discrimination under the ADA a plaintiff must show that (1) he is disabled within the meaning of ADA; (2) he is otherwise qualified to perform the essential functions of the job; and (3) he has suffered an adverse employment decision as a result of discrimination. 42 U.S.C. § 121 *et seq.*; *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999).

A. Disability

A "disability" is defined by the ADA as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102 (2); *See also Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1998). In this case, Defendants argue that Reppert does not have a disability within the meaning of the ADA. Reppert counters that he is disabled as defined by the ADA because he suffers from epilepsy, a medical condition which affects two recognized major life activities – sleep and work.

1. Impairment That Substantially Limits A Major Life Activity

The Supreme Court has set forth a three-step analysis for determining whether an

individual has an impairment that substantially limits a major life activity. *Bragdon v. Abbott*, 524 U.S. 624, 630 (1998) (declining to consider whether HIV infection is a *per se* disability). First, the court must determine whether the individual has an impairment. *Id.* Next, the court must identify the life activity upon which the individual relies and determine whether it constitutes a major life activity under the ADA. *Id.* Finally, the court must determine whether the impairment “substantially limits” that major life activity. *Id.* The Supreme Court has said that this test must be “interpreted strictly to create a demanding standard for qualifying as disabled.” *Toyota Motors Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

The first element of the Supreme Court’s three-step analysis is met here because the parties both acknowledge that Reppert was diagnosed with epilepsy. However, in regards to steps two and three, identifying whether the life activity constitutes a major life activity under the ADA and whether Reppert’s impairment substantially limits that major life activity, the parties directly disagree.

Specifically, Reppert argues that, despite the fact that his epileptic condition is properly treated by prescribed medication, he is disabled within the meaning of the ADA because his epileptic condition substantially impairs his major life activities of sleeping and working. Reppert further asserts that his “shift work affects his ability to sleep,” which in turn adversely affects “his ability to focus and concentrate at work even if his epilepsy is treated by [prescribed] medication.”⁷ (Pl.’s Brief in Support 4.)

⁷ Reppert’s specific assertion that he is disabled within the meaning of the ADA, not because of his epileptic condition but rather because his work affects his sleep, which in turn adversely affects his ability to concentrate at work is circular and flawed. Adopting Reppert’s unsupported and incorrect reasoning regarding this particular point, it is quite evident that almost anyone could argue that he is disabled under the ADA simply because he worked late one night and the rigors of the overtime work disrupted their regular sleeping regimen. This line of reasoning undermines the purpose and integrity of the ADA.

Defendants counter that Reppert cannot meet his burden by merely showing he has an impairment because a plaintiff diagnosed with epilepsy is not presumptively disabled. *Bley v. Bristol Twp. Sch. Dist.*, No. 05-CV-0029, 2006 U.S. Dist. LEXIS 3113 at *13 (E.D. Pa. Jan. 27, 2006) (noting in an epilepsy case that “merely having an impairment does not make one disabled for the purposes of the ADA”) (citing *Toyota Motors*, 534 U.S. at 195)).

In regards to Reppert’s general assertion that he is disabled within the meaning of the ADA because his epileptic condition substantially impairs his major life activities of sleeping and working, the Code of Federal Regulations is instructive as to the meaning of the terms “major life activities” and “substantially limits.” The term “major life activities” means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(I). Thus, sleeping and working fall within the confines of a major life activity.

With respect to the major life activity of working, the term “substantially limits” means:

significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skill and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. 1630.2(j)(3)(I).

The proper inquiry in making this determination requires a court to evaluate “whether the particular impairment constitutes for the particular person a significant barrier to employment.” *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 784 (3d Cir. 1998) (quoting *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996) (citing *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)). The Third Circuit has determined that it is necessary to conduct an

individualized assessment of the extent to which a plaintiff's alleged condition coupled with his personal characteristics substantially limit his ability to work. Specifically, the Third Circuit stated that because a "person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled, *Webb*, 94 F. 3d at 487, the court must consider the effect of the impairment on the employment prospects of that individual with all of his relevant personal characteristics. *Forrisi*, 794 F.2d at 933. Thus, a substantially limiting impairment for one individual may not be substantially limiting for another individual with different characteristics. *Modzelewski*, 784 F.3d at 784 (citing 29 C.F.R. pt. 1630, app. § 1630.2(j)); *McKay v. Toyota Mfg. U.S.A., Inc.*, 110 F.3d 369 (6th Cir. 1997) (finding plaintiff with carpal tunnel syndrome not disabled because, among other things, she had higher education); *Smith v. Kitterman, Inc.*, 897 F. Supp. 423, 427 (W.D. Mo. 1995) (finding plaintiff with disability had raised material issue of fact because of her limited education, training and employment background.)

While epilepsy may be an impairment, Reppert has failed to present evidence to establish that his epilepsy substantially limits or restricts him from performing any major life activity. In his deposition, Reppert admitted that his epilepsy does not prevent him from: (1) driving, (2) operating heavy machinery, (3) working, (4) caring for himself, (5) caring for his two young children, or (6) performing daily household chores. (Pl.'s Dep. at 34, 187-88.) Reppert acknowledged that despite having epilepsy, the only way it affects his daily life is that he has to monitor his sleeping patterns and eating habits and "do a little extra thinking to be a little extra

careful” from time to time.⁸ *Id.* at 32-33, 35, 188. Furthermore, Reppert controls his epilepsy with medications and he testified that he has had only three (3) seizures in the fifteen (15) years since having been diagnosed with epilepsy and has never had a seizure at work. *Id.* at 29, 31-32.

The Supreme Court has held that

a disability exists only where an impairment substantially limits a major life activity, not where it “might,” “could,” or “would” be substantially limiting if mitigating measures were taken. A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently “substantially limits” a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not “substantially limit” a major life activity.

Sutton, at 483.

Reppert’s ADA claims for discriminatory employment termination fail because he has failed to demonstrate that his epilepsy prevents or severely limits his ability to perform a major life activity. Thus, Reppert has failed to illustrate that he is disabled within the meaning of the ADA.⁹

Although Reppert has not made a prima facie case of discrimination under the ADA, in the interest of judicial diligence, the Court will now address whether Defendants’ reason for the

⁸ Moreover, persuasive decisions have held that individuals diagnosed with epilepsy who suffered from similar or worse effects than those identified by Reppert are not disabled under the ADA. *See, e.g., Thompson v. AT&T Corp.*, No. 2:03CV33, 2006 U.S. Dist. LEXIS 1017, at *13-16 (W.D. Pa. Jan. 12, 2006) (plaintiff with epilepsy who was unable to drive, was advised she possibly should not have children, had a premature child, was unable to care for her after a seizure, and had to have an adult present when she bathes not restricted in a major life activity); *Popko v. Pa. State Univ.*, 84 F. Supp. 2d 589, 593-94 (M.D. Pa. 2000) (plaintiff with epilepsy who rarely had seizures and who had to adhere to a therapeutic sleep regimen of 7 to 8 hours of sleep per night to control her seizures not substantially limited in a major life activity).

⁹ The Court’s analysis under the ADA applies equally to Reppert’s PHRA claims as described in Count III & IV of his Amended Complaint. *See Gomez v. Allegheny Health Servs., Inc.*, 71 F.3d 1079, 1083-84 (3d Cir. 1995) (noting that PHRA and Title VII are interpreted similarly) (citation omitted); *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996).

adverse employment action are legitimate and non-discriminatory.

II. McDonnell-Douglas Burden Shifting

In their Motion for Partial Summary Judgment, Defendants allege Reppert's suspension and discharge was not the result of pretextual discrimination based upon Reppert's apparent disability, but rather the byproduct of Reppert exposing his buttocks to a security camera and several outbursts involving profane and threatening language directed toward his co-workers. Defendants argue that in May 2002, Reppert was issued a warning after he lost his temper and yelled at a co-worker on the production line. A month later, in June 2002, Reppert was given a written warning after he deliberately shook a piece of malfunctioning production equipment and screamed at the maintenance employee who attempted to repair it.¹⁰ As a result of his outburst, Reppert received a written warning regarding Coca-Cola's Standards of Conduct, which "prohibit fighting or any other form of disorderly conduct, including use of threatening, profane or abusive language toward others." (Doc. 26, Defs.' Ex. 25.) The warning reiterated to Reppert that violations to Coca-Cola's Standards of Conduct could subject him "to further disciplinary action, to and including termination." *Id.* Defendants argue that Reppert's suspension and termination was not pretext, but rather due to Reppert violating Coca-Cola's Standard of Conduct guidelines. Reppert has failed to cite any case law, or identify any evidence of record, that could by any stretch of intellect support a finding that terminating an employee who clearly, repeatedly, and purposely violates company policy is a non-legitimate reason for executing an

¹⁰ Following this incident, Reppert halted the production line, locked his equipment out (rendering it inoperable), and went to the office of his Supervising Team Leader, David Crossley, to sit down. (Defs.' Mot. for Partial Summ. J. at 2.) Upon being asked to return to work, Reppert began yelling and cursing loudly at Mr. Crossley and other members of the managing team. *Id.* Reppert's second-level supervisor, Production Manager Jan Jenkins, overheard the yelling and profanity and intervened. *Id.*

adverse employment action. Such a finding, given the circumstances of this case and Reppert's own failure to respond to Defendants' reasons for firing him, would be asinine. Thus, the Court holds that Defendants' reason for the adverse employment action is reasonable and non-discriminatory.

CONCLUSION

After careful review of the record, for the foregoing reasons, the Court concludes that Defendants' Motion for Partial Summary Judgment to dismiss Claims I-IV of Reppert's Amended Complaint is granted. An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ERIK ERNST REPPERT.

Plaintiff,

vs.

COCA-COLA FOUNTAIN, ET AL.

Defendant.

|

|

|

|

|

|

|

|

CIVIL ACTION

NO. 05-3034

ORDER

AND NOW, this ____ day of August, 2006, **IT IS HEREBY ORDERED** that Defendants' Motion for Partial Summary Judgment (Doc. 35) to dismiss Counts I-IV of Plaintiff's Amended Complaint is **GRANTED**. Count V of Plaintiff's Amended Complaint remains.

IT IS FURTHER ORDERED that Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Partial Summary Judgment (Doc. 40) is **DISMISSED as MOOT**.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.